

No. 19-1012

**In the
Supreme Court of the United States**

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

RAYTHEON TECHNOLOGIES CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

**REPLY IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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INTRODUCTION

RTC's response is most striking in its failure to acknowledge the heightened "standard" that the Federal Circuit has adopted "for Article III standing in the context of appeals from *inter partes* review [IPR] proceedings." Pet. App. 9a (Hughes, J., concurring). RTC ignores Judge Hughes' detailed critique of that standard. *See id.* at 9a-18a. It ignores the entrenched line of Federal Circuit cases recognizing standing only where an IPR petitioner "show[s] concrete current or future plans to infringe"—a showing akin to the "reasonable apprehension of imminent suit" test for declaratory judgment jurisdiction, which [this Court] overruled" in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007). Pet. App. 13a-14a (Hughes, J.). And, instead, RTC tries (at 12) to dismiss this case as "entirely factbound." But GE is challenging the Federal Circuit's heightened standing rule; the propriety of that legal rule is in no way tied to the particular facts of this case; and taking that rule on its terms, it is clear that certiorari is warranted.

ARGUMENT

I. RTC Ignores The Federal Circuit's Patent-Specific Standing Rule

As Judge Hughes explained, the Federal Circuit has adopted a heightened "standard for Article III standing in the context of [IPR] appeals." Pet. App. 13a-16a. Under that standard, if an IPR "petitioner is not currently engaged in infringing activity and has no concrete plans to do so in the imminent future," the Federal Circuit has "held that the Board's decision to uphold a challenged patent does not invoke the

competitor standing doctrine.” *Id.* at 14a. In other words, the Federal Circuit requires “activity that would give rise to a possible infringement suit,” *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1362-63 (Fed. Cir. 2019) (citation omitted)—despite the lack of any similar “risk-of-litigation” standard in other contexts. Remarkably, RTC ignores Judge Hughes’ detailed critique of the Federal Circuit’s rule.

RTC also ignores the language of the Federal Circuit decisions expressly imposing this standing requirement. *See* Pet. App. 13a (Hughes, J.); Pet. 16 n.4. The Federal Circuit has repeatedly reaffirmed this rule, stating: “Our cases establish that typically in order to demonstrate the requisite injury in an IPR appeal, the appellant/petitioner must show that it is engaged or will likely engage in an activity that would give rise to a possible infringement suit, or has contractual rights that are affected by a determination of patent validity.” *JTEKT Corp. v. GKN Automotive Ltd.*, 898 F.3d 1217, 1220 (Fed. Cir. 2018) (alteration in original) (citations omitted), *cert. denied*, 139 S. Ct. 2713 (2019); *see id.* at 1221; *AVX Corp.*, 923 F.3d at 1365. Indeed, just last month, the Federal Circuit—invoking the decision below—dismissed an IPR appeal by a company seeking to bring a generic version of a patented drug to market, even though the challenger presented compelling evidence of economic injury, including up to \$50 million in potential lost profits. *See Argentum Pharm. LLC v. Novartis Pharm. Corp.*, No. 2018-2273, 2020 WL 1944759, at *1-3 (Fed. Cir. Apr. 23, 2020).

Commentators have recognized this rule, *see* Unified Patents, LLC *Amici* Br. 6 n.2 (articles), as has RTC itself. In seeking to dismiss GE’s recent IPR appeal, RTC’s predecessor argued that, under the

Federal Circuit rule, GE “must show that it is engaged or will likely engage ‘in an[] activity that would give rise to a possible infringement suit,’ or has contractual rights that are affected by a determination of patent validity.” Mot. to Dismiss 11, *GE v. UTC*, No. 19-1319 (Fed. Cir.), ECF No. 17-1 (alteration in original) (quoting *JTEKT*, 898 F.3d at 1220).

In now arguing that the Federal Circuit has not in fact adopted the rule described by the Federal Circuit’s decisions, by Judge Hughes, and by RTC itself, RTC (at 14-17) plucks language from Federal Circuit opinions discussing more general principles, and notes that the Federal Circuit has “relied on” competitor standing decisions from other circuits. But RTC omits that each of the cited Federal Circuit decisions ultimately turned on whether the appellants met the Federal Circuit’s “imminent infringement” test—a heightened standard applied by no other circuit. *See, e.g., AVX*, 923 F.3d at 1365; *JTEKT Corp.*, 898 F.3d at 1220.

RTC points (at 17) to two cases in which the Federal Circuit has *found* standing. But in both cases, the court stressed that infringement was already occurring or admittedly about to begin. *See E.I. Dupont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996, 1004-05 (Fed. Cir. 2018); *Altaire Pharm., Inc. v. Paragon Biotech, Inc.*, 889 F.3d 1274, 1282-83 (Fed. Cir. 2018). Indeed, in *AVX*, the Federal Circuit distinguished *DuPont* on the ground that DuPont was already using the same features as the challenged patent, making an infringement suit inevitable. 923 F.3d at 1366-67; *see Choirock Contents Factory Co. v. Saucier*, No. 2019-1335, 2020 WL 864877, at *4 (Fed. Cir. Feb. 21, 2010) (finding standing because facts

demonstrated “activity that would give rise to a possible infringement suit”). In short, these cases only confirm that the Federal Circuit has erected a “risk-of-future-infringement-suit” test—and that is precisely the *problem* that warrants review.¹

II. The Federal Circuit’s Patent-Specific Rule Warrants This Court’s Review

Confronting the Federal Circuit’s rule head on, it is clear that this Court’s review is warranted.

A. The Federal Circuit’s Rule Conflicts With The Decisions Of Other Circuits

No other circuit imposes a “likelihood of litigation” requirement to establish Article III standing. Instead, other circuits recognize that Article III requires a flexible inquiry into whether challenged action causes concrete, imminent harm—including competitive harm. Those decisions hold that the “form of th[e] injury may vary,” and that a competitor need not wait until an action “hurt[s] [him] competitively” before challenging the “government decision that increases competition.” *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (first alteration in original) (citation omitted). And instead of artificially narrowing the kinds of harm that can establish standing, they apply “basic economic logic” when assessing competitive harm. *American Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1198 (D.C. Cir. 2015); Pet. 17-24 (citations). Those

¹ The same goes for *Grit Energy Solutions, LLC v. Oren Technologies, LLC*, No. 2019-1063, 2020 WL 2078397, at *5 (Fed. Cir. Apr. 30, 2020) (finding standing where petitioner “engaged in acts that not only could give rise to a possible infringement suit, but *did* give rise to an infringement suit”).

decisions illustrate the variety of ways in which competitive injuries can trigger standing.

RTC's attempt to distinguish the D.C. Circuit's decision in *Sherley* crystallizes the conflict. As RTC explains, the plaintiff doctors in *Sherley* competed for a "fixed amount of [grant] money," and were thus forced to "invest more time and resources to craft a successful grant application." Opp. 22 (emphasis and citation omitted). But the same is true here. GE and RTC fiercely compete for a share of a "fixed" pool of business—the opportunity to manufacture the engine for a particular model of commercial aircraft—in a market with just three major manufacturers. See Pet. App. 16a-17a (Hughes, J.); *id.* at 61a-62a. GE has already been forced to invest additional time and resources to design around the challenged patent, as well as being asked by Boeing to explore designs potentially implicating RTC's patent. Pet. 10. Under *Sherley*'s reasoning, that is "an actual, here-and-now injury" triggering standing. 610 F.3d at 74.²

Meanwhile, RTC simply ignores most of the cases cited in the petition demonstrating the common-sense, flexible approach to competitive harm taken by other circuits, including *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (plaintiff need only "demonstrate that it is a direct and current competitor whose bottom line *may* be adversely affected by the challenged government action"

² *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002), is not to the contrary. Cf. Opp. 21. There, the D.C. Circuit denied standing where there was no "existing competitor" benefited by the challenged agency decision. 294 F.3d at 172. Here, RTC and GE are already fierce competitors—and RTC is directly benefited, and GE harmed, by the PTO's decision.

(emphasis altered) (citation omitted)); *see* Pet. 17-24. None of those cases erect the kind of heightened standard for triggering competitor standing imposed by the Federal Circuit’s patent-specific rule.

B. The Federal Circuit’s Rule Flouts This Court’s Precedent

This Court has repeatedly repudiated the Federal Circuit’s attempts to create patent-specific exceptions to generally applicable rules. Pet. 28. RTC largely ignores those decisions. And the conflict with those precedents is especially sharp because the Federal Circuit’s standing rule effectively resurrects the “reasonable apprehension of suit” test rejected in *MedImmune*. *Id.* at 28-29 (citation omitted).

In *MedImmune*, this Court overturned the Federal Circuit’s patent-specific requirement that plaintiffs seeking to bring declaratory judgment actions challenging the validity of patents must show a “reasonable apprehension of [infringement] suit” to establish jurisdiction. *See* 549 U.S. at 132 & n.11 (citation omitted); *ABB Inc. v. Cooper Indus., LLC*, 635 F.3d 1345, 1348 (Fed. Cir. 2011). The Federal Circuit’s standing test for IPR appeals—which requires an appellant to show a substantial risk of an infringement action—is functionally identical to that repudiated test. Pet. App. 13a (Hughes, J.).

RTC (at 26-28) attempts to distinguish *MedImmune* on its facts. But it fails to acknowledge the direct parallels between the Federal Circuit’s new standard for IPR appeals and its failed *MedImmune* standard. In refusing to find IPR standing in *AVX*, for example, the Federal Circuit emphasized that “what is missing” is “the inevitability of an infringement suit.” 923 F.3d at 1366. Yet that

requirement plainly “conflate[s] the injury-in-fact analysis with the ‘reasonable apprehension of imminent suit’ test” rejected in *MedImmune*. Pet. App. 13a (Hughes, J.) (citation omitted). And there is no more basis to artificially limit standing to a risk of suit in the IPR context than there is to similarly confine declaratory judgment jurisdiction.

There is also no reason that Article III should require a different result merely because this case involves an appeal from an agency decision concerning patent validity rather than a declaratory judgment suit concerning patent validity. The Article III standard for injury-in-fact surely cannot be higher here. Indeed, if anything, the fact that Congress expressly authorized appeals from adverse PTO decisions, and attached burdensome estoppel consequences to such decisions (35 U.S.C. § 315(e); Pet. 30-31) only heightens the case for standing here.

RTC also fails to distinguish this Court’s competitor-standing decisions. Pet. 24-26 (discussing *Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998), and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970)). To be sure, a “competitive relationship *alone*” is not sufficient to establish standing. Opp. 16 (emphasis added). But GE has never advanced that position. Instead, GE merely maintains that—as Judge Hughes explained—the Federal Circuit’s test improperly fails to account for the *full* range of economic and competitive injuries that can establish standing. Pet. App. 15a-17a; *see* *Frontier Communications Corp. Amicus* Br. 10. Put simply, a risk of infringement suit is not the *only* way to establish injury-in-fact.

As Judge Hughes explained, this case presents an especially strong case for competitor standing under

this Court’s precedents. Pet. App. 16a-17a. GE and RTC fiercely compete for a share of the aircraft engine market. *Id.* at 16a. In that market, it takes years to develop and bring an engine to market. *Id.* RTC’s patent thus “effectively precludes GE from meeting its customer’s design needs without spending additional resources to design around the patent,” and the PTO’s decision gold-plates that patent, leaving GE no choice but to risk willful infringement or having to expend resources to design around it. *Id.* at 17a. This “costly competitive burden” establishes injury-in-fact under this Court’s cases. *Id.*³

Under the Federal Circuit’s precedent, the only way GE can establish competitor standing is by essentially admitting infringement. By artificially narrowing the competitive injuries that trigger standing, the Federal Circuit’s rule is “out of step with Supreme Court precedent.” *Id.* at 9a.

C. The Question Presented Is Undeniably Important

RTC does not seriously challenge the importance of the question presented. Nor could it. This Court has always carefully policed standing rules, mindful that courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.).

³ RTC (at 9, 34) embraces the Federal Circuit’s holding that GE’s added research costs are irrelevant because GE did not provide a detailed “accounting.” Pet. App. 7a. But that, too, conflicts with this Court’s decisions. Pet. 27 n.7; *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *Renewable Fuels Ass’n v. U.S. EPA*, 948 F.3d 1206, 1233-34 (10th Cir. 2020) (following *Czyzewski* to find injury-in-fact).

Moreover, the standing question here has immense practical importance, given the centrality of appellate review to the scheme Congress instituted in the AIA for reviewing patents. Pet. 5-6, 32-33; *see* S. Rep. No. 110-259, at 18-19 (2008), 2008 WL 275437 (previous statutory regime’s restrictions on right to appeal after losing before PTO “made reexamination a much less favored avenue to challenge questionable patents than litigation”). Indeed, the PTO is reversed in approximately 30% of cases where it upholds the validity of challenged patents in IPR proceedings—making a rule that unnecessarily insulates those agency decisions from judicial review particularly perverse. *See* Frontier Br. 6-7.

As amici explain, the Federal Circuit’s rule also has perverse impacts on “[c]ompetition and innovation.” Unified Patents Br. 4; *see* Frontier Br. 4 (discussing “real and severe” consequences of Federal Circuit’s rule). That rule imposes a high cost on businesses—and especially startups—by essentially requiring competitors to walk up to the line of admitting infringement and disclose their future business plans to rivals. Unified Patents Br. 14, 20; Frontier Br. 4-5, 10-11. Nothing in Article III, or this Court’s standing precedents, justifies setting such a steep price for securing judicial review of such consequential administrative decisions.

III. RTC’s Remaining Arguments Are Baseless

Instead of genuinely engaging on the question presented, RTC resorts to a grab-bag of objections to review. None withstands scrutiny.

RTC repeatedly proclaims (at 1, 12, 30) that this Court has “twice rejected” the question presented here, pointing to *RPX Corp. v. ChanBond LLC*, No.

17-1686, and *JTEKT Corp. v. GKN Auto. Ltd.*, No. 18-750. But neither of those petitions raised the competitor-standing question here—instead, they asked the distinct question whether Congress had granted petitioners *statutory* standing to appeal from adverse IPR decisions, regardless of any economic harm. Indeed, in response to the Court’s call for its views in *RPX*, the United States emphasized that the petitioner there had not preserved a competitor-standing argument and had in fact conceded that it could not show injury arising from the patent. *RPX* U.S. Amicus Br. 8 & n.2, 10, No. 17-1686. This petition thus presents the very question the United States emphasized was *not* raised by *RPX*.

RTC’s mantra that this case is “factbound” is also unavailing. While RTC’s *opposition* attempts to transform this case into a dispute about whether particular affidavits demonstrate standing, the petition itself seeks review of the heightened legal rule that the Federal Circuit has adopted for establishing standing in the IPR context. To be sure, whether a party has standing ultimately turns on the facts of the case. But that has never prevented this Court from granting review in order to articulate the governing rule in the first place. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Whether this Court chooses to apply the proper rule, or remand for the Federal Circuit to do so, certiorari is warranted to decide whether the Federal Circuit properly erected its heightened standing requirement.

Nor does GE’s pending IPR appeal provide any basis to deny review. Opp. 2, 20, 32. To the contrary, that appeal just underscores the consequences of the Federal Circuit’s rule: To meet the risk-of-litigation

test, GE was forced to state that its engine design for an aircraft application uses a technology “that GE believes [RTC] would accuse of infringing its overly broad ‘920 patent.” GE Br. 62, No. 19-1319 (Fed. Cir.), ECF No. 34. And despite that risky admission, RTC still insists GE lacks standing under the Federal Circuit’s rule. But even if the Federal Circuit ultimately finds standing there, it would merely illustrate the unnecessary business risks that the Federal Circuit’s heightened standard forces companies to take just to have their day in court. It would in no way alleviate the need for this Court’s review to ensure that businesses are not put to the harsh dilemma of having to risk treble damages and a finding of willful infringement (by making such admissions) or forego judicial review of PTO decisions that concretely impact their ability to compete.

Finally, GE is by no means seeking a *relaxed* standard. Opp. 12, 25-26. GE simply asks this Court to review the Federal Circuit’s *heightened* standing requirement for IPR appeals, which fails to recognize the broad array of competitive harms that can create a concrete, here-and-now injury. *See* Pet. 17-27; Frontier Br. 10. Nor would eliminating the Federal Circuit’s heightened requirement confer standing on *anyone* (or even any competitor) who wishes to appeal an IPR decision, just as eliminating the reasonable-apprehension-of-litigation standard invalidated in *MedImmune* did not automatically confer declaratory judgment jurisdiction. An IPR petitioner would need to demonstrate “a concrete and particularized” harm (*Lujan*, 504 U.S. at 560), as GE has. *See* Pet. 7-12. In

any event, RTC's merits arguments provide no reason for denying plenary review to begin with.⁴

CONCLUSION

The petition should be granted.

Respectfully submitted,

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⁴ Nor is there any need to CVSG. Unlike *RPX*, the question presented here does not turn on the operation of the statutory scheme; it turns on Article III and this Court's precedents. In that respect, this case is just like *MedImmune*.